(2)

No. 91-630

In the Supreme Court of the United States

OCTOBER TERM, 1991

BRUCE J. RICE AND RICE AIRCRAFT, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court's failure to inform petitioner of the potential consequences of a probation violation constituted a violation of Fed. R. Crim. P. 11(c)(1) and, if so, whether the error was harmless under Fed. R. Crim. P. 11(h).

2. Whether the district court failed to resolve material disputes as to the accuracy of petitioner's presentence report, in violation of Fed. R. Crim. P. 32(c)(3)(D).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-630

BRUCE J. RICE AND RICE AIRCRAFT, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is unreported, but the decision is noted at 937 F.2d 614 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1991. A petition for rehearing was denied on September 10, 1991 (Pet. App. 15). The petition for a writ of certiorari was filed on October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following pleas of guilty in the United States District Court for the Western District of Washington, petitioners Bruce J. Rice and Rice Aircraft, Inc., were convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and one count of mail fraud, in violation of 18 U.S.C. 1341. Rice was convicted on an additional count of mail fraud. Rice was sentenced to four years' imprisonment, three years' probation, fined a total of $500,000, and assessed previously agreed costs of $250,000. Pet. App. 16-19. Rice Aircraft, Inc., was fined $50,000. Pet. App. 20-22. The court of appeals affirmed. Pet. App. 1-14.

1. Petitioners Bruce J. Rice and Rice Aircraft, Inc., an aircraft supply firm owned and controlled by Rice, were involved in the payment of $155,000 in kickbacks to seven representatives of the company's suppliers and customers. See Mar. 9, 1990, Sentencing Tr. 81-94. Their fraudulent activities also included the sale of structural aerospace nuts and bolts accompanied by test reports that were unrelated to the parts delivered. *Id.* at 83-86. Finally, petitioners were involved in the sale of aerospace nuts and bolts that had been secretly stripped and replated by an unapproved manufacturer and delivered with original manufacturers' test reports that did not relate to the reprocessed parts. *Ibid.*

2. On appeal, Rice claimed that he was entitled to reversal of his convictions because the district court failed personally to advise him at his Rule 11 hearing of the maximum possible sentence he faced and the terms of his probation. The court of appeals rejected that claim. Pet. App. 3-7. The court noted that Rule 11(c)(1), Fed. R. Crim. P., requires that the district court, "[b]efore accepting a plea of guilty,

* * * address the defendant personally in open court and inform [him] of, and determine that [he] understands, * * * the maximum possible penalty provided by law." Rule 11(h) provides, however, that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." The court of appeals stated that a Rule 11 violation is harmless if the record reveals that the defendant had "actual knowledge of sentencing consequences of his guilty plea." Pet. App. 3-4.

The court of appeals found that Rice knew the maximum penalties for each of the three counts on which he was convicted. The court noted that Rice's plea agreement stated in precise terms that "[e]ach of the three counts in the Information contains a maximum period of incarceration of five years." Pet. App. 4. Rice conceded in open court that he had read that document:

> THE COURT: Mr. Rice, have you reviewed this eight-page plea agreement in detail?
>
> THE DEFENDANT: Yes, I have.
>
> THE COURT: Have you discussed it with your attorneys?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is this your signature on page eight of the plea agreement, dated August 14, 1989?
>
> THE DEFENDANT: Yes, it is.

Pet. App. 5. The court held that under the circumstances of this case, in which the record showed that the defendant read "in detail" a document setting forth his maximum sentence, it was permissible to look beyond the oral record of the plea proceeding to determine whether petitioner knew the maximum penalty to which he was exposed. The court of ap-

peals also found that Rice knew that probation could be imposed on Counts 2 and 3. The district court had asked Rice: "And the plea agreement, if accepted by the Court, would involve probation on Counts II and III. Is that your understanding?" Rice responded, "Yes, sir." *Ibid.*

The court of appeals rejected Rice's claim that he failed to apprehend that, if placed on probation, he could ultimately be imprisoned for an additional ten years if he violated the conditions of his probation. The court found that the relationship between the maximum statutory penalty of ten years' imprisonment and probation "is inherent in the very concept of probation." Pet. App. 6. "While we do not presume sophisticated legal knowledge on the part of a defendant," the court determined, "it is difficult to imagine how Rice's vision of probation would differ from the correct definition. It would appear self-evident that the court would retain some form of coercion, i.e., the possibility of incarceration, over the defendant to ensure the defendant's compliance with the conditions of 'probation.'" *Ibid.*

Moreover, the court held, in determining whether a defendant understood the consequences of his or her plea, the reviewing court may consider the defendant's education, age, intelligence, and alacrity of response, as well as the presence of counsel. Pet. App. 6. The court found that Rice was a well-educated, sophisticated businessman who admitted discussing the terms of the plea agreement "in detail" with his counsel. As a result of the lengthy plea negotiations, the court determined, Rice had much greater input as to his possible sentence than many defendants, and his plea of ignorance was "unpalatable under the facts of this case." Pet. App.

7. The court therefore concluded that any error by the district court in failing to explain the consequences of probation to Rice (an issue the court did not decide) was harmless. *Ibid.*

Both petitioners argued that the district court violated Fed. R. Crim. P. 32(c)(3)(D) in failing properly to dispose of their challenges to the factual accuracy of matters contained in the presentence report. The court of appeals first noted that it was "confronted here with defendants who, if anything, have obfuscated their objections by thrusting upon the district court a monstrous sentencing memorandum, leaving the district court to ferret its way through the massive document, segregating statements inconsistent with the presentence report from those that are not." Pet. App. 8. The court thus harbored "grave reservations" over petitioners' failure to itemize their objections, but nonetheless decided to consider their claim. *Id.* at 9.

The court of appeals concluded that the district court " 'substantially complied' with Rule 32, if in fact it did not fully comply with the Rule." Pet. App. 10 (emphasis omitted). The court found that the manner in which the district court handled the case "demonstrated that [the court] had mastered [its complex] facts." *Ibid.* Thus, the district court's statement that it would, subject to certain specific findings, accept the facts as listed in the presentence report "was not a perfunctory statement designed to dispose of numerous objections quickly and without consideration." *Ibid.* To the contrary, the record showed that the district court reviewed all of the relevant materials and accepted the facts in the presentence report because it found them to be true. *Ibid.* The court of appeals dismissed petitioners' claim that

the district court expressly refused to make certain findings, noting that the district court had refused only to hold an evidentiary hearing on the issues, a permissible course under Rule 32. Pet. App. 10.

ARGUMENT

1. Rice contends (Pet. 9-21) that the district court's failure personally to advise him that he would be subject to incarceration if he violated the conditions of his probation amounted to a failure to apprise him of the "maximum penalty" for his offenses, and that his convictions must be reversed as a consequence.

The record reflects that Rice was accurately informed of the maximum sentence to which his guilty plea exposed him. The district court informed Rice that under the plea agreement, he faced a maximum potential term of incarceration of five years on Count 1, and terms of probation on Counts 2 and 3. See Pet. 3-4, quoting Aug. 16, 1989, Tr. 12-13. Petitioner does not dispute that he was given that information. Rather, he claims that the district court failed adequately to explain what consequences might befall him should he violate the terms of his probation. Petitioner cites no cases, and we are aware of none, requiring a district court to explain the consequences that might follow from a defendant's violation of the conditions of his probation. Cf. *Weaver* v. *United States*, 454 F.2d 315 (7th Cir. 1971) (assuming without deciding that Rule 11 requires explanation of consequences of probation violation). Indeed, with respect to post-conviction supervision, the express language of Rule 11(c)(1) requires only that the district court address "the effect of any special parole or supervised release term," and makes no reference to the effects of ordinary probation.

Even assuming that the district court erred in failing to explain to petitioner that he might be incarcerated if he violated the terms of his probation, that error was harmless under Rule 11(h), which provides that any variance from the procedure required by Rule 11 that does not affect a defendant's substantial rights "shall be disregarded." Petitioner has not shown that the alleged violation affected his substantial rights. In particular, nothing in the record suggests that petitioner would not have pleaded guilty if he had known that he could be imprisoned if he violated the terms of his probation.

Although we agree with petitioner that the courts of appeals are in conflict as to the interpretation of the harmless error provision of Rule 11(h) (see *United States* v. *Hourihan*, 936 F.2d 508, 511, n.4 (11th Cir. 1991) (per curiam) (collecting cases)), that conflict does not extend to providing warnings about the possible effects of probation revocation. The Fifth Circuit, for example, has repeatedly held that a district court's failure personally to address a defendant regarding one of the "core concerns" of Rule 11 (which include understanding the direct consequences of the plea, one of which is the maximum penalty for an offense) entitles the defendant to automatic reversal of his conviction.[1] That court, however, has never held that a failure to warn a defendant of the consequences of revocation of probation warrants automatic reversal. Indeed, a recent Fifth Circuit decision suggests that that court would apply harmless error analysis in the present situation, since a failure

---

[1] *E.g.*, *United States* v. *Bernal*, 861 F.2d 434 (1988), on reh'g, 871 F.2d 490, cert. denied, 493 U.S. 872 (1989); *United States* v. *Pierce*, 893 F.2d 669, 679 (1990); *United States* v. *Shacklett*, 921 F.2d 580, 583 (1991).

to discuss the details of probation would deal at most with one component of the core concern that the defendant understand the maximum penalty for his offense; under Fifth Circuit law, automatic reversal is not warranted in such circumstances. *United States* v. *Bachynsky*, 934 F.2d 1349, 1355 (en banc) (per curiam) (distinguishing between factors that are separate components of "core concerns" and factors that constitute distinct "core concerns"), cert. denied, 112 S. Ct. 402 (1991).[2]

In addition, this Court has in the past declined to review the conflict among the circuits regarding the proper scope of Rule 11(h). In *United States* v. *Bernal*, 861 F.2d 434 (1988), on reh'g, 871 F.2d 490 (5th Cir.), cert. denied, 493 U.S. 872 (1989), we sought review of the question whether the Fifth Circuit's rule of automatic reversal is permissible under Rule 11(h), and the Court denied certiorari. 493 U.S. 872 (1989). Earlier this Term, we acquiesced in the

---

[2] In *Bachynsky*, the district court failed to advise the defendant that his sentence could include a term of supervised release. The government argued that because the defendant's total sentence (including both imprisonment and supervised release) was less than the maximum term of imprisonment of which he had been advised, the omission could not possibly have affected the defendant's substantial rights. Applying its *per se* rule, a panel of the Fifth Circuit held that the omission constituted a complete failure to address a core concern and reversed the conviction. 924 F.2d 561 (1991). Before the full court, the government argued that the court should reexamine the automatic reversal rule, arguing that it was incompatible with Rule 11(h). While the court acknowledged that this argument was "not unpersuasive[]," it chose to dispose of the case on a narrower ground. The court held that the district court's omission constituted only a partial failure to address a core concern, which rendered the automatic reversal rule inapplicable. 934 F.2d at 1358, 1359-1360. The court then concluded that the error was harmless. *Id.* at 1360-1361.

petition for certiorari in another case raising the identical issue, and the Court once again denied certiorari. *United States* v. *Young*, 927 F.2d 1060 (8th Cir.), cert. denied, 112 S. Ct. 384 (1991). The issue on which petitioners seek review in this case is identical to that presented in *Bernal* and *Young*; there is no reason for the Court to grant this petition in light of the denials of the petitions in those cases.

2. Petitioners renew their contention that the district court erred in failing to resolve disputes over factual material in the presentence report, or to disclaim reliance upon the disputed material once it decided not to resolve those disputes. Under Fed. R. Crim. P. 32(c)(3)(D), the district court is required to make findings as to the accuracy of facts contested at sentencing or to make a determination that such findings are unnecessary because the court does not intend to rely on the disputed facts at sentencing.

As petitioners concede (Pet. 8), they never identified the specific factual statements in the presentence report that they thought were without basis. Petitioners chose instead to present their factual contentions as part of a rambling discourse on the facts of this highly complex case. Pet. App. 8. In their submission to this Court, petitioners assert that the presentence report—and the district court—failed to resolve the following factual disputes: (a) whether the illegal kickbacks were in fact "extorted" from Rice; (b) whether the replating of aerospace nuts and bolts sold by Rice Aircraft posed a potential safety problem; and (c) whether customers relied on Rice Aircraft's submission of inaccurate test results concerning the nuts and bolts. See Pet. 6-7. The record discloses, however, that the district court considered and disposed of each of these issues.

As to the alleged "extortion" of the payoffs, Rice himself admitted at sentencing that the payoffs were a combined product of "fear, inexperience, embarrassment. * * * But no matter which way you go, the result is poor judgment and it's the same. The payments are wrong. And I admit it. * * * I should have said no." Mar. 9, 1990, Sentencing Tr. 65. The district court noted, moreover, that the payments of $155,000 over the period of 1982 through August 1987 were made "under elaborate procedures to conceal payment * * * for the purpose of gaining a competitive advantage in the industry, and * * * Rice Aircraft did in fact obtain an advantage as a result of these illegal payments." *Id.* at 92.

As to the safety implications of petitioners' crimes, the district court stated:

> Rice's arguments that only a few instances have been shown and no safety problems have been proven misses [*sic*] the mark. The industry and the public have been deprived of important safety information for essential elements in the aircraft production process. The actions of the defendants would put at risk numerous parts supplied to various aircraft companies over a long period of time.

Mar. 9, 1990, Sentencing Tr. 89-90. The district court thus rejected petitioners' contention that safety concerns were not implicated by their actions.

Finally, the district court rejected petitioners' claim that the industry did not rely upon the inaccurate representations concerning test results. The court stated that a "customer is obviously going to rely upon" test reports, and that it made no difference that the reports were accurate with respect to other parts. Mar. 9, 1990, Sentencing Tr. 86. The court rejected peti-

tioners' argument that the test reports were inconsequential, noting that petitioners would not have submitted the false reports "if it wasn't important to hide what they were doing." *Id.* at 87. The district court concluded that the "industry did in fact rely and they were entitled to rely upon [the falsified test] certificates." *Ibid.*

In sum, each of the disputed factual contentions that petitioners raise in this Court was resolved by the district court. Nothing raised in the petition demonstrates anything but "strict compliance" with Rule 32(c)(3)(D).

Because the district court resolved the factual disputes brought to its attention, this case does not present a need to resolve any conflict that may exist among the circuits regarding whether Rule 32(c)(3)(D) demands "strict" rather than "substantial" compliance.[3] Thus, although some circuits require less than "strict compliance" with Rule 32(c)(3)(D), see Pet. 25-30, a decision by this Court that "strict compliance" is required would not benefit petitioners.[4]

---

[3] Moreover, the fact that the district court specifically resolved the factual disputes brought to its attention by petitioners obviates any need for review of the asserted conflict among the circuits regarding the sufficiency of a district court's general resolution of disputed factual matters in a presentence report. See Pet. 27-30.

[4] Although the Ninth Circuit panel in this case did not decide whether strict compliance or substantial compliance is required, we note that the Ninth Circuit en banc has held that strict compliance is required, thus adopting the rule for which petitioner contends. *United States* v. *Fernandez-Angulo*, 897 F.2d 1514, 1516 (1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45241